

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

FEB 06 2015

OFFICE OF
MANAGING DIRECTOR

Dennis C. Brown, Esq.
8124 Cooke Court, Suite 201
Manassas, VA 20109-7406

Licensee: **Maritime Communications/Land Mobile,
LLC, Debtor-in-Possession**
Waiver and Deferment Regulatory Fees (Financial
Hardship-Bankruptcy
Disposition: **Dismissed and Denied** (47 U.S.C. § 159(c)(2)
& (d), 47 C.F.R. §§ 1.1164(e), 1.1166(c) & (e))
Stations: Multiple
Fee: Fiscal Year (FY) 2013 Regulatory Fees
Fee Control No.: RROG-13-00015445

Dear Counsel:

This responds to Licensee's *Request*¹ for a waiver and deferral from payment of the Fiscal Year (FY) 2013 regulatory fees. Our records reflect that Licensee did not pay the FY 2013 regulatory fees; furthermore, Licensee failed either to pay the FY 2012 regulatory fees² or to request and receive a waiver from payment. As we discuss below, we dismiss because Licensee is delinquent paying the FY 2012 fee, and deny because Licensee failed to provide the required documentation.

Background

On September 18, 2013, Licensee filed its *Request* to defer payment and waive the payment of the required FY 2013 fee. Licensee included only a copy of a Notice of Bankruptcy Case Filing from the United States Bankruptcy Court, Northern District of Mississippi indicating that on August 1, 2011, Licensee filed the case under Chapter 11 of the United States Bankruptcy Code. In addition to the September 2013 *Request*, in 2011, Licensee requested and received a Commission waiver and deferral from payment of the FY 2011 regulatory fees. Our decision on Licensee's 2011-request³ included our admonition,

¹ Letter from Dennis C. Brown, 8124 Cooke Court, Suite 201, Manassas, VA 20109 to Marlene H. Dortch, Secretary, FCC, Washington, D.C. 20554 (Sep. 18, 2013)(rec'd Oct. 21, 2013)(*Request*).

² See e.g., What You Owe-Commercial Wireless Services For FY 2012, *Regulatory Fees Fact Sheet* (Aug. 2012).

³ Letter from Robert J. Keller, Counsel for Maritime, Robert J. Keller, P.C., P.O. Box 33428, Farragut Station, Washington, D.C. 20033-0428 to Marlene H. Dortch, Secretary, FCC, Washington, D.C. 20554 (Sep. 14, 2011).

We note ... Licensee has a burden to demonstrate the existence of financial hardship and the continuing accuracy of the filed information.⁴ Licensee is reminded that any future request for a waiver of fees must include full documentation to reflect the existence and status of a petition in bankruptcy, the content of any plan for reorganization, and the Licensee's then-current financial situation.⁵

Although Licensee submitted a waiver request in 2011 and 2013, our records indicate that Licensee did not either pay the required FY 2012 regulatory fee or request a waiver and petition for deferral.

Standards

Under 47 U.S.C. § 159 and the Commission's rules, we are required to "assess and collect regulatory fees" to recover the costs of the Commission's regulatory activities,⁶ and when the required payment is received late or it is incomplete, to assess a penalty equal to "25 percent of the amount of the fee which was not paid in a timely manner."⁷ Specifically, "[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee ... which was not paid in a timely manner."⁸ Each year, the Commission establishes the final day on which payment must be received before it is considered late,⁹ i.e., a deadline after which the Commission must assess charges that include the statutory late payment penalty required by 47 U.S.C. § 159(c)(1) and 47 C.F.R. §§ 1.1157(c)(1) and 1.1164, as well as interest, penalties, and charges of collection required by 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940. Moreover, when an applicant for relief is delinquent in paying the regulatory fee, under 47 U.S.C. § 159(c)(2) and 47 C.F.R. §§ 1.1164(e), and 1.1910(b)(2) & (3), we will dismiss¹⁰ a request for relief and impose the statutory penalty.¹¹

⁴ See 47 C.F.R. § 1.1166(c) ("Waiver requests that do not include the required fees or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship."); Assessment and Collection of Regulatory Fee for Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812, 10819, ¶ 17 (2011) ("A regulatee's mere allegation of financial hardship thus does not automatically entitle it to a deferral of its obligation to pay regulatory fees; only a properly supported claim of financial hardship will entitle the regulatee to a deferral. Accordingly, if a request for deferral is not supported by documentation of financial hardship, it will be denied, and an associated petition for waiver or reduction will be dismissed."); 47 C.F.R. § 1.65.

⁵ Letter from Mark Stephens, Chief Financial Officer, FCC to Robert J. Keller, Esq., Robert J. Keller, P.C., P.O. Box 33428, Farragut Station, Washington, D.C. 20033-0428 (Apr. 16, 2012) (*2012 Approval*).

⁶ 47 U.S.C. § 159(a)(1); 47 C.F.R. § 1.1151.

⁷ 47 U.S.C. § 159(c)(1); 47 C.F.R. §§ 1.1157(c)(1); 1.1164.

⁸ 47 C.F.R. § 1.1164.

⁹ See Assessment and Collection of Regulatory Fees for Fiscal Year 2012, *Report and Order*, MD Docket No. 12-116, FCC 12-76, 27 FCC Rcd 8390 (2012); Reminder That FY 2012 Regulatory Fees Are Due No Later Than September 13, 2012, Eastern Time, *Public Notice*, DA 12-1423 (Aug. 31, 2012) (*2012 Fee PN*).

¹⁰ 47 U.S.C. § 159(c)(2) ("The Commission may dismiss any application or other filing for failure to pay in a timely manner any fee or penalty under this section."); 47 C.F.R. §§ 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment."); 1.1166(c) ("Waiver requests that do not include the required fees or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship.").

¹¹ 47 U.S.C. § 159; 47 C.F.R. § 1.1166; *Waivers, Reductions and Deferrals of Regulatory Fees, Regulatory Fees Fact Sheet* (Sep. 5, 2013) 2013 WL 4773993 (F.C.C.) ("The Commission will dismiss any petition for waiver of a

In establishing a regulatory fee program, the Commission recognized that in certain instances, payment of a regulatory fee may impose an undue financial hardship upon a licensee, and it may be waived, reduced, or deferred upon a showing of good cause and a finding that the public interest will be served thereby.¹² The Commission has narrowly interpreted its waiver authority to require a showing of extraordinary and compelling circumstances that outweigh the public interest in recouping the Commission's regulatory costs.¹³ Fee relief may be granted based on a "sufficient showing of financial hardship."¹⁴ "Mere allegations or documentation of financial loss, standing alone," do not suffice, and "it [is] incumbent upon each regulatee to fully document its financial position and show that it lacks sufficient funds to pay the regulatory fee and to maintain its service to the public."¹⁵ Thus, to establish a basis for waiver predicated on financial need, the regulatee must provide financial documents including, e.g., a licensee's balance sheet and profit and loss statement (audited, if available), a cash flow projection for the next twelve months (with an explanation of how calculated), a list of their officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information. On this information, the Commission considers on a case-by-case basis whether the licensee met the standard to show the station lacks sufficient funds to pay the regulatory fee and maintain service to the public.¹⁶

Verified evidence of bankruptcy is a relevant fact;¹⁷ however, "in some circumstances a significant question may exist as to whether bankruptcy represents extraordinary and compelling circumstances justifying a waiver when balanced against the public interest in reimbursing the Commission for its costs as reflected in the statutory fee provisions."¹⁸ An applicant must present

regulatory fee that does not include a payment or the required petition for deferral and supporting documentation, and under 47 U.S.C. § 159(c) and 31 U.S.C. § 3717, the Commission is required to impose the 25% penalty and other relevant charges. A request for waiver, reduction or deferral must be received before the fee due date. * * * The Commission will dismiss a waiver request filed by a delinquent debtor or a petition that does not have the required financial documentation.").

¹² 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166. See also Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Report and Order*, 9 FCC Rcd 5333, 5344 (1994), *recon. denied*, 10 FCC Rcd 12759 (1995).

¹³ 9 FCC Rcd at 5344 ¶ 29; Phoenix Broadcasting, Inc. Stations KSWD and KPFN Seward, Alaska, *Memorandum Opinion and Order*, 18 FCC Rcd. 26464, 26446, ¶¶ 5-6 (2003) ("Fee relief may be granted based on asserted financial hardship, but only upon a documented showing that payment of the fee will adversely impact the licensee's ability to serve the public. ... [I]n the absence of a documented showing of insufficient funds to pay the regulatory fees, [applicant] has not made a compelling showing that overrides the public interest in the Commission's recouping the costs of its regulatory activities.").

¹⁴ Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Memorandum Opinion and Order*, 10 FCC Rcd 12759, 12761-62, ¶ 13 (1995) (FY 1994 MO&O).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Id.* at 12762, ¶ 14 ("[W]here a bankruptcy trustee, receiver, or debtor in possession is negotiating a possible transfer of a license, the regulatory fee could act as an impediment to the negotiations and the transfer of the station to a new licensee.").

¹⁸ Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Notice of Proposed Rulemaking*, 18 FCC Rcd 6085, 6090, ¶ 11 (2003) ("Although fee waivers will generally be given in cases of financial hardship, we nevertheless note that even under our current policies, in some circumstances a significant question may exist as to whether bankruptcy represents extraordinary and compelling circumstances justifying a waiver when balanced against the public interest in reimbursing the Commission for its costs as reflected in the statutory fee provisions. ...

"extraordinary and compelling circumstances showing that a waiver ... would override the public interest" in collecting the fee,¹⁹ and we analyze the facts of each case to determine whether the applicant has satisfied both prongs of the Commission's standard, financial hardship and extraordinary²⁰ and compelling circumstances²¹ showing waiver is justified.²²

A bankruptcy proceeding is established with verified court records, such as, in a reorganization under Chapter 11 of the Bankruptcy Code, copies of the relevant filings, forms, and evidence the trustee or debtor-in-possession has complied with its required duties²³ by including court filed financial reports.²⁴

Discussion

Licensee's *Request* fails to overcome two problems; Licensee failed to resolve the consequences from failing to pay FY 2012 fees and Licensee failed to submit required supporting financial documentation with its *Request*.

First, the Commission's records show that Licensee failed either to pay its FY 2012 regulatory fees or submit a timely request to waive the fees accompanied by a proper petition to defer payment. As such, Licensee is delinquent in paying the FY 2012 regulatory fees, 25% penalty, and other accrued charges. Thus, we dismiss the *Request*,²⁵ and we assess interest and penalties from the date of delinquency, and under the law,²⁶ we will apply debt collection procedures.²⁷

Relevant to the delinquency, this response serves to notify Licensee that under 31 U.S.C. § 3711(g), without further notice, and usually within 180 days or less of delinquency, we will transfer the delinquent debt to Treasury, which will initiate collection action through private collection activities and assess additional charges. In addition, we may refer the debt to the Department of Justice, which may result in litigation and additional costs.

This ends the matter; however, as a courtesy, we look to the merits of the *Request*, and find that the second problem, the absence of supporting documentation, is a ground to deny.

We therefore emphasize that under the statutory waiver provisions, case-by-case review of fee waiver requests is necessary to determine the public interest, even in bankruptcy cases.").

¹⁹ 47 U.S.C. § 159(d) ("The Commission may waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest."); 47 C.F.R. § 1.1166 ("fee ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). *FY 1994 MO&O*, 10 FCC Rcd at 12761, ¶ 12.

²⁰ Black's Law Dictionary (9th ed. 2009)(extraordinary-"a highly unusual set of facts that are not commonly associated with a particular thing or event").

²¹ *Id.* (compelling-"something so great that irreparable harm or injustice would result if not met").

²² Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Report and Order*, 18 FCC Rcd 15985, 15989-90, ¶¶ 11, 13, 14 (2003).

²³ See 11 U.S.C. § 521.

²⁴ 11 U.S.C. §§ 1106, 1107, 1166; Fed. R. Bkr. P., Rule 1007.

²⁵ 47 U.S.C. § 159(c)(2); 47 C.F.R. § 1.1164(e).

²⁶ See 47 C.F.R. § 1.1901, *et seq.*

²⁷ See 31 C.F.R. § 3717.

Licensee's second problem is it failed to include the required financial documentation we described in our *2012 Approval*.²⁸ Instead, Licensee showed only that it filed a Chapter 11 petition to reorganize. That filing is incomplete and it lacks context. For example, Licensee failed to include basic relevant court records, *e.g.*, the petition, evidence of authorization to file, and initial forms and schedules and, relevant to the issue of financial hardship and inability to pay the annual regulatory fees, financial information pertaining to the debtor-in-possession and the Licensee. In that regard, to provide further examples, and not to exclude other relevant financial information, Licensee should furnish copies of (a) statutorily required lists, schedules, and statements,²⁹ (b) reports required by bankruptcy court rules,³⁰ (c) current cash flow statements and operating reports, (d) reports of current, post-bankruptcy filing liabilities, (e) reports of post-petition credit (with or without judicial review) (secured and unsecured), (f) reports or statements showing the disposition of current liabilities, (g) relevant court orders, (h) draft and final plans for reorganization, and (i) present and future offers to purchase any or all of Licensee's assets. This information is the essence of the bankruptcy proceeding that Licensee should present to show whether the debtor-in-possession is experiencing financial hardship, and to resolve questions whether bankruptcy presents extraordinary and compelling circumstances justifying a waiver.

The required information is readily available. Indeed, it is required to be filed with the petition or in response to the court's orders. In contrast to that required evidence to establish a relevant bankruptcy proceeding and the Licensee's relevant financial situation, Licensee's submission offers only a citation to our rule and a quotation from *FY 1994 MO&O*. That does not meet our standard that the applicant must present "extraordinary and compelling circumstances showing that a waiver ... would override the public interest" in collecting the fee.³¹ Licensee fails to establish a basis on which to determine under the law³² whether Licensee established good cause and that the deferral and waiver would promote the public interest. Specific to a Chapter 11 reorganization, Licensee fails to show either to defer payment or to waive the fee, "the impact of the regulatory fee [on the Licensee's] ability to serve the public,"³³ and to show how the public interest will be served by waiving the fee.

Licensee represents itself to be a debtor-in-possession, which is a fiduciary of the estate, exercising powers for the benefit of the creditors,³⁴ including keeping all creditors informed of the status of the business undergoing reorganization through the use of pervasive reporting.³⁵ The mentioned financial information documentation in court filings maintains the expected degree of disclosure and transparency in both the bankruptcy proceeding³⁶ and in a waiver request before

²⁸ See notes 4 & 5, *supra*.

²⁹ See Fed.R.Bankr.P., Rule 2015.

³⁰ *Id.*

³¹ *FY 1994 MO&O*, 10 FCC Rcd at 12761, ¶ 12.

³² 47 U.S.C. § 159(d) ("good cause shown, where such action would promote the public interest."); 47 C.F.R. § 1.1166 ("good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest.").

³³ *FY 1994 MO&O*, 10 FCC Rcd at 12762, ¶ 13.

³⁴ *Modern Office Supply, Inc.*, 28 B.R. 943, 944 (W.D. Ok., Bankr. 1983).

³⁵ *Id.*

³⁶ *Visicon Shareholders Trust*, 478 B.R. 292, 311 (S.D. Oh, Bankr. 2012).

the Commission. Moreover, these required court filings show how the debtor-in-possession continues to operate in the normal course of business,³⁷ including paying from current revenues postpetition expenses, such as the Commission's annual regulatory fees.

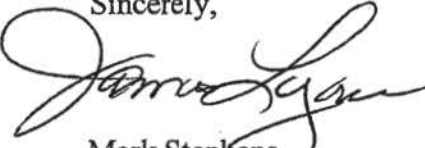
We will not speculate about the substance of the information that might fill in the gaps that result from Licensee's failing in its duty to clarify their position with the Commission³⁸ and to maintain the accuracy and completeness of their application.³⁹ Indeed, previously, we admonished Licensee that any further request for a waiver must include documentation.

Accordingly, because Licensees fail to establish that the "bankruptcy represents extraordinary and compelling circumstances justifying a waiver when balanced against the public interest in reimbursing the Commission for its costs as reflected in the statutory fee provisions,"⁴⁰ we deny the *Request*.

Finally, this provides notice that under 31 U.S.C. § 3716, 31 C.F.R. § 285.5, and 47 C.F.R. § 1.1912, some or all of the debt may be collected by non-centralized or centralized administrative offset. Also, under 31 U.S.C. § 3711(e), this debt and Licensee's payment history will be reported to credit reporting information bureaus. Because we have furnished notice here, Licensee may not receive another notification of this process. Licensee will be red lighted⁴¹ until it pays the debt or makes other satisfactory arrangements.⁴²

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,


 FOR: Mark Stephens
 Chief Financial Officer

³⁷ *Matt v. HSBC Bank, USA*, 968 F.Supp. 2d 351, 359 (D.Ma. 2013).

³⁸ *Bartholdi Cable Co. Inc. v FCC*, 114 F3d 274, 280 (DC Cir. 1997) (The Commission "'need not sift pleadings and documents' to identify arguments that are not 'stated with clarity' by a petitioner. It is the petitioner that has the burden of clarifying its petition before the agency.").

³⁹ 47 C.F.R. § 1.65 ("Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application ... whenever the information furnished ... is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of the application so as to furnish such additional or corrected information as may be appropriate.).

⁴⁰ 18 FCC Rcd at 6090, ¶ 11.

⁴¹ See 47 C.F.R. § 1.1910(b)(2) ("Action will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination, or request for authorization by any entity found to be delinquent in its debt to the Commission"); 47 C.F.R. § 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment.").

⁴² See 47 C.F.R. § 1.1914 ("If a debtor is financially unable to pay a debt in one lump sum, the Commission, in its sole discretion, may accept payment in regular installments.").

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

JAN 22 2015

OFFICE OF

MANAGING DIRECTOR

Shrida Shah
Senior Tax Accountant
Masergy Communications, Inc.
2740 North Dallas Parkway, Ste. 260
Plano, Texas 75093

Licensee/Applicant: **Masergy Communications, Inc.**

Waiver and Refund: Late Payment Penalty

Disposition: **Dismissed and Denied** (47 U.S.C. § 159(c)(1),
31 U.S.C. § 3717, 47 C.F.R. §§ 0.401, 1.1157(c)(1), 1.1164,
1.1166, 1.1940(f))

Fee: Fiscal Year (FY) 2011 Regulatory Fee Late Fee and
Accrued Charges

Date Request Submitted: Jun. 4-16, 2014

Date Charges Paid: Jun. 12, 2014

Fee Control No.: RROG-13-00015625

Dear Ms. Shah:

This responds to Licensee's *Request*¹ for waiver and refund of the penalty and charges for late payment of the Fiscal Year (FY) 2011 regulatory fees. As we explain in detail below, we dismiss because Licensee failed to comply with Commission rules for filing the *Request*, and, in the alternative, deny because Licensee failed to establish legal grounds or clear mitigating circumstances for waiving collection of the penalty.

Background

Under 47 U.S.C. § 159 and the Commission's rules, we are required to "assess and collect regulatory fees" to recover the costs of the Commission's regulatory activities,² and when the required payment is received late or it is incomplete, and it is "not excused by bank error,"³

¹ Emails from Shrida Shah [shrida.shah@masergy.com] to ARINQUIRIES (ARINQUIRIES@fcc.gov) (Jun. 4, 10, 12, 13, 2014) (*Request*) with enclosures (a) letter from Irene Peterson, Tax Director, Masergy Communications, Inc., 2740 North Dallas Parkway, Suite 260, Plano, TX 75093 to Dept. of the Treasury, Financial Management Service, P.O. Box 830794, Birmingham, AL 35283-0794 (Aug. 20, 2013) (*Dispute Letter*), (b) letter from U.S. Treasury Department, Debt Management Services-Bureau of the Fiscal Service, The Hager Building, 25 West Oxmoor Rd., Suite 7B, Birmingham, AL 35209 to Masergy Communications Inc., 2740 North Dallas Parkway, Suite 260, Plano TX 75093 (Apr. 21, 2014) with Debtor Dispute Cover Page, FedDebt Case ID.: 2013302691A, letter from FCC, RE: FedDebt Case ID: 2013302691 (Apr. 21, 2014) (*Response to Debtor Dispute*). Licensee's submission by email to the Commission's staff does not comply with the Commission's rule for filing a request for waiver and refund. See 47 C.F.R. §§ 0.401, 1.7, and 1.1166(a)(2).

² 47 U.S.C. § 159(a)(1); 47 C.F.R. § 1.1151.

³ 47 C.F.R. § 1.1164.

then to assess a penalty equal to "25 percent of the amount of the fee which was not paid in a timely manner."⁴ Thereafter, as the law provides,⁵ from the date of delinquency, we assess interest, penalties, and administrative charges for collection.

For FY 2011, the deadline for paying regulatory fees was September 16, 2011;⁶ however, by that date, the Commission had not received Licensee's full payment of its regulatory fee. Indeed, no payment was received until after October 27, 2011, when Licensee sent a check for the amount of the earlier-due regulatory fee to the Commission's government lockbox account with U.S. Bank in St. Louis, MO.⁷ Licensee asserts,⁸ the reason for its delay was it first mailed a check to the street address of the Universal Service Administrative Company, and only after determining the earlier check had not been negotiated did Licensee send a second check.

⁴ 47 U.S.C. § 159(c)(1); 47 C.F.R. § 1.1164.

⁵ 31 U.S.C. § 3717; 47 C.F.R. §§ 1.1164(f)(4), 1.1940; Implementation Of Section 9 Of The Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Report and Order*, 9 FCC Rcd 5333, 5354, ¶ 65 (1994) ("Included in the recovery of any delinquent fee will be an assessment of interest on the debt due, a penalty for nonpayment, and the allowable cost incurred due to the federal government in the collection process."); Assessment And Collection Of Regulatory Fees For Fiscal Year 2010, *Report and Order*, 25 FCC Rcd 9278, 9297-98 ¶ 54 (2010) ("A late payment penalty of 25 percent of the unpaid amount of the required regulatory fee will be assessed on the first day following the deadline date for filing of these fees. Failure to pay regulatory fees and/or any late penalty will subject regulatees to sanctions, including those set forth in section 1.1910 of the Commission's Rules and in the Debt Collection Improvement Act of 1996 ('DCIA'). We also assess administrative processing charges on delinquent debts to recover additional costs incurred in processing and handling the related debt pursuant to the DCIA and section 1.1940(d) of the Commission's rules. These administrative processing charges will be assessed on any delinquent regulatory fee, in addition to the 25 percent late charge penalty. In case of partial payments (underpayments) of regulatory fees, the licensee will be given credit for the amount paid, but if it is later determined that the fee paid is incorrect or not timely paid, then the 25 percent late charge penalty (and other charges and/or sanctions, as appropriate) will be assessed on the portion that is not paid in a timely manner.").

⁶ See FY 2011 Regulatory Fees Due No Later Than September 14, 2011, Eastern Time, *Public Notice*, DA 11-1420 (Aug. 17, 2011); FY 2011 Regulatory Fee Deadline Is Extended To 11:59 PM ET, September 16, 2011, *Public Notice*, DA 11-1559 (Sep. 15, 2011).

⁷ Licensee did not include with its *Request* relevant evidence to support the assertions; nonetheless, we are able to summarize the undisputed facts from materials submitted to the U.S. Department of the Treasury, i.e., Facsimile transmission from Irene Peterson, Masergy Communications, Inc., 2740 North Dallas Parkway, Suite 260, Plano, TX 75093 to US Dept of the Treasury (Aug. 20, 2013) (*Fax*) with letter from Irene Peterson, Tax Director, Masergy Communications, Inc., 2740 North Dallas Parkway, Suite 260, Plano, TX 75093 to Dept. of the Treasury, Financial Management Service, P.O. Box 830794, Birmingham, AL 35283-0794 (Aug. 20, 2013) (*Dispute Letter*), with enclosures (a) letter from Department of the Treasury, Financial Management Service, P.O. Box 830794, Birmingham, AL 35283-0794 to Masergy Communications Inc., 2740 North Dallas Parkway, Suite 260, Plano, TX 75093 (Aug. 6, 2013) (*Delinquent Debt Demand*), (b) email from FCC Regulatory Fees Program to Shrida Shah (Jul. 21, 2011) (Attachment 1), (c) check receipt # 40353 to FCC, C/O USAC, 2000 L Street N.W., Suite 200, Washington, DC 20036 (25 Aug 11) (Attachment 2a), (d) check receipt # 40938 to FCC, C/O USAC, 2000 L Street N.W., Suite 200, Washington, DC 20036 (27 Oct 11) (Attachment 2b), (e) check report number 40938 cleared date 10/31/2011 (Attachment 2c), (f) extract page from FCC Report for Submitted Fees Report Date 8/24/2011 (Attachment 3), (g) extract page from FCC Fee Filer, Interstate Telephone Service Provider Worksheet (Attachment 3), (h) FedEx mailing label from Shrida Shah, Masergy Communications, 2740 N. Dallas Parkway, Ste 260, Plano, TX 75093 to U.S. Bank Government Lockbox, FCC, 1005 Convention Plz, SL-MO-C2-GL, Saint Louis, MO 63101, (ship date 27Oct11) (*FedEx label*) (Attachment 3), and (i) extract page from FCC Fee Filer, Regulatory Fee Manager (Aug. 20, 2013) (Attachment 4). Attachments 2b & 3, *FedEx label*; see Payment Methods and Procedures For Fiscal Year 2011 Regulatory Fees, *Public Notice*, DA 11-1418 (rel. Aug. 17, 2011) (*Payment Method PN*).

⁸ *Id.*, *Dispute Letter*.

That second check, however, was insufficient to cover the full fee, which by then included the 25% statutory penalty. The resulting delinquency went unresolved, and on November 13, 2012, the Commission notified Licensee that it was delinquent in paying the amount equal to the statutory penalty required by 47 U.S.C. § 159(c)(1) (25% of the regulatory fee) and the accrued charges required by 31 U.S.C. § 3717 (the charge of collection, interest, and penalties).⁹ When the debt remained delinquent, the Commission followed 31 U.S.C. § 3711(g)(1), 31 C.F.R. § 285.12(c), and 47 C.F.R. § 1.1917 by transferring the debt to Treasury for further collection action. Under the law, Treasury takes “appropriate action to collect or compromise the transferred debt, or to suspend or terminate collection action,”¹⁰ and the Commission ceases collection action.¹¹ Thus, on August 6, 2013, Treasury notified Licensee of the delinquency and demanded payment of the debt plus additional accrued charges.¹² Rather than paying that amount, on August 20, 2013, Licensee asked Treasury to abate “the penalty and interest”¹³ asserting, payment for the regulatory fee was sent in a timely manner to the address of the Universal Service Administrative Company. Licensee acknowledged it initiated the problem by using an incorrect wrong address because its “AP department ... system had the USAC address instead of the FCC address.”¹⁴ Even so Licensee asserted that the Commission did not “communicate[with Licensee] about the penalty ... almost 2 years [after the debt was due, when Licensee] receive[d] a debt notice[; moreover, as an apparent matter in mitigation, Licensee does not] have any [other] outstanding [debts].”¹⁵

Treasury provided the Commission a copy of the *Dispute Letter*, and on April 21, 2014, the Commission responded that 47 U.S.C. § 159 and 47 C.F.R. § 1.1164 require that the Commission assess a 25% penalty on any fee that is not paid by the fee payment deadline.¹⁶ Furthermore, the Commission emphasized that it had announced in the FY 2011 regulatory fee order that regulatory fee payments “must be received and stamped at the lockbox bank by the last day of the regulatory fee filing window.”¹⁷ Finally, the Commission explained Licensee had not presented legal grounds for a waiver. On April 21, 2014, Treasury notified Licensee of the Commission’s response, and thereafter it continued collection action.

Licensee, however, did not pay the delinquent debt, rather on June 4, 2014, it submitted an email directly to a person on the Commission staff seeking further review of the *Dispute Letter*. Finally, on June 12, 2014, Treasury reported receiving Licensee’s payment, and on the same day, Licensee continued its email request that the Commission waive and refund the late payment charges, including the amount of the penalty, charges of collection and interest and penalties.

⁹ See FCC Remittance Advice, Bill for Collection from FCC to Masergy Communication Inc., 2740 North Dallas Parkway, Suite 260, Plano, TX 75093 (Nov. 13, 2012).

¹⁰ 31 C.F.R. § 285.12(c)(2).

¹¹ 47 C.F.R. 1.1917(b) (“Once a debt has been transferred to Treasury ... the Commission will cease all collection activity related to that debt.”).

¹² *Delinquent Debt Demand*.

¹³ *Fax, Dispute Letter*.

¹⁴ *Dispute Letter*.

¹⁵ *Id.*

¹⁶ *Response to Debtor Dispute*.

¹⁷ Assessment and Collection of Regulatory Fees For Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812, 10826, ¶ 36 (2011) (2011 Regulatory Fee Order).

Discussion

We first look to whether Licensee complied with the law and the Commission's required procedures, and if not, we consider whether such failings are grounds to dispose of the *Request*. In that regard, there are three grounds for our dismissal.

First, on June 4, 2014, the date on which Licensee submitted the email *Request* to the Commission staff, the Commission had ceased collection activity because it had transferred the debt to Treasury.¹⁸ As such, under 31 U.S.C. § 3711 and 31 C.F.R. § 285.12, Treasury had the legal authority to collect the debt and to respond to Licensee's questions. Accordingly, the *Request* should have been directed to Treasury, so we dismiss. Further, as the undisputed facts show and we discuss below, Licensee's *Request* restates the matters presented to Treasury and rejected.¹⁹

Next, on June 4, 2014, Licensee was delinquent in paying a portion of the FY 2011 regulatory fee.²⁰ Specifically, Licensee's check on October 27, 2011, which was insufficient to pay the fee and the 25% penalty, was first applied to the penalties and accrued charges leaving the regulatory fee account delinquent,²¹ the amount of which accrued charges, *e.g.*, interest, penalties and charges of collection.²² Moreover, because of its continued delinquency, Licensee was subject to sanctions for nonpayment, including dismissal of applications for relief.²³ Finally, because Licensee was delinquent on June 4, 2014, when it first submitted the *Request*, its later continuation of an email exchange was not a proper resubmission of the *Request*.²⁴ Thus, on these grounds, we dismiss.

Finally, we dismiss because Licensee failed to comply with the Commission's rule for filing. Undisputed facts show that Licensee submitted its *Request* as various email messages to Commission staff between June 4 and 18, 2014. As such, Licensee failed to comply with our

¹⁸ 47 C.F.R. § 1.1917(b).

¹⁹ *Response to Debtor Dispute*.

²⁰ See FY 2011 Regulatory Fees Due No Later Than September 14, 2011, Eastern Time, *Public Notice*, DA 11-1420 (Aug. 17, 2011); FY 2011 Regulatory Fee Deadline Is Extended To 11:59 PM ET, September 16, 2011, *Public Notice*, DA 11-1559 (Sep. 15, 2011).

²¹ 47 C.F.R. §§ 1.1940(f) ("When a debt is paid in partial ... payments, amounts received ... shall be applied first to outstanding penalties and administrative cost charges, second to accrued interest, and third to the outstanding principal.").

²² 31 U.S.C. § 3717, 47 C.F.R. §§ 1.1157(c)(1), 1.1164(c) ("If a regulatory fee is not paid in a timely manner, the regulatee will be notified of its deficiency. This notice will automatically assess a 25 percent penalty, subject the delinquent payor's pending applications to dismissal, and may require a delinquent payor to show cause why its existing instruments of authorization should not be subject to rescission.").

²³ 47 C.F.R. § 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment. The application may be resubmitted only if accompanied by the required regulatory fee and by any assessed penalty payment.").

²⁴ 47 C.F.R. § 1.1164(e) ("The application may be resubmitted only if accompanied by the required regulatory fee and by any assessed penalty payment.").

rules requiring submission to the Office of the Secretary.²⁵ Thus, under 47 C.F.R. §§ 0.401 and 1.7,²⁶ it is not filed, and we dismiss.²⁷

This ends the matter; however, as a courtesy and as a matter of administrative efficiency, we looked to the content of Licensee's *Request*, but find it lacks merit.

The essence of Licensee's initial problem is that it mailed the regulatory fee to the wrong address because its "AP department ... system had the USAC address instead of the FCC address."²⁸ Licensee's second problem is that it allowed the amount of the delinquency to increase by failing to pay the accrued statutory penalty when mailing the second check to the correct address more than 30 days after the due date. Although we are sympathetic to Licensee's assertion that the initial problem resulted from its inadvertent error, the root cause, Licensee's internal system error or its lack of attention in verifying the mailing address of an important regulatory fee payment, is not a legal ground or clear mitigating circumstance to waive collection of the penalty or charges. Moreover, Licensee's further explanation shows the subsequent accrued charges of collection, interest and penalties resulted directly from failing to make full payment in October of 2011. Plainly, nothing in the explanation ameliorates Licensee's obligation to pay the delinquency charges. Finally, we note, Licensee's *Request* restates the same arguments rejected at Treasury.²⁹ There is no basis to reconsider the matter.

The consequences of non-payment are not new. They are set forth in the statute³⁰ and the Commission's initial fee collection rulemaking.³¹ Moreover, on July 21, 2011, the Commission admonished licensees that regulatory fee payment must be received and stamped at the lockbox bank by the last day of the regulatory fee filing window, and if not, a late payment penalty of 25 percent of the unpaid amount is assessed. The failure to pay the fee and any late penalty results in sanctions and additional charges.³² Repeatedly, the Commission has held that "[l]icensees are expected to know and comply with the Commission's rules and regulations and will not be excused for violations thereof, absent clear mitigating circumstances."³³

²⁵ 47 C.F.R. §§ 1.7 ("pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission."), 1.1166(a)(2) ("request should be filed with the Commission's Secretary.").

²⁶ 47 C.F.R. § 0.401 ("The Commission maintains several offices and receipt locations. Applications and other filings not submitted in accordance with the addresses or locations set forth [in the Commission's rules] will be returned to the applicant without processing."); § 1.7 ("pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission.").

²⁷ *WJIT Broadcasting Corp., Order on Reconsideration*, 16 FCC Rcd 8446, 8446-47, ¶ 3-4 (WTB 2001).

²⁸ *Dispute Letter*.

²⁹ Compare email from Shrida Shah [shrida.shah@masergy.com] to Cheryl.collins@fcc.gov (Jun. 13, 2014) with *Dispute Letter*.

³⁰ 47 U.S.C. § 159(c).

³¹ Implementation Of Section 9 Of The Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Report and Order*, 9 FCC Rcd 5333, 5354, ¶ 65 (1994) ("Included in the recovery of any delinquent fee will be an assessment of interest on the debt due, a penalty for nonpayment, and the allowable cost incurred due to the federal government in the collection process.").

³² *2011 Regulatory Fee Order, supra*.

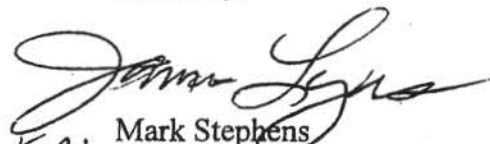
³³ See *Sitka Broadcasting Co., Inc.*, 70 FCC 2d 2375, 2378 (1979), citing *Lowndes County Broadcasting Co.*, 23 FCC 2d 91 (1970) and *Emporium Broadcasting Co.*, 23 FCC 2d 868 (1970); see also *NextGen Telephone (OMD)*, Apr. 22, 2010; *Istel, Inc. (OMD)*, Apr. 22, 2010).

Licensee's partial payment in October of 2011 failed to resolve its delinquency and red light³⁴ status or to abate accrual of charges of collection, interest, and penalties. Indeed, Licensee remained delinquent in paying its regulatory fee until June 12, 2014. Thus, as required by 47 C.F.R. §§ 1.1164(e)³⁵ and 1.1910, until full payment is made, our process is to dismiss an application and to demand immediate payment. Even so, the Commission provided Treasury a response to Licensee's *Dispute Letter* that included a complete explanation of the charges and our standard. Neither the law nor the circumstances have changed since our response.

Neither the statute nor the Commission's regulations contemplates a waiver of or reduction in the late payment penalty based on the amount of time after the deadline within which the regulatee satisfies its payment obligations or whether the matter is the first such event; indeed, the penalty for late payment applies even to situations where the deadline is missed by a short period of time.³⁶ The penalty required by 47 U.S.C. § 159(c)(1) is not limited to situations where the failure to pay was knowing or willful. If it is to be waived, it is "only in the most extraordinary circumstances,"³⁷ which Licensee does not establish. Thus, we deny the *Request*.

If Licensee has any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,


For: Mark Stephens
Chief Financial Officer

³⁴ 47 C.F.R. § 1.1910.

³⁵ 47 C.F.R. §§ 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee The application may be resubmitted only if accompanied by the required regulatory fee and by any assessed penalty payment."), 1.1910.

³⁶ See *XO Communications, LLC* (OMD, Nov. 10, 2010).

³⁷ *McLeodUSA Telecommunications Services, Inc.*, *Memorandum Opinion and Order*, 19 FCC Rcd 6587, 6589 (2004) (denying the request for waiver of 25 percent penalty).

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

FEB 23 2015

OFFICE OF
MANAGING DIRECTOR

Molly Derry
Finance Director
Monmouth Independence Networks
405 N. Hogan Road
Monmouth, OR 97361

Licensee/Applicant/Regulatee: **Monmouth Independence Networks (MINET)**
Exemption: Government Entity
Disposition: **Dismissed and Denied** (47 U.S.C. § 159; 47 C.F.R. §§ 0.401, 1.7, 1.1159, and 1.1162)
Fee(s): Annual Regulatory Fee(s)
Fee Control No. RROG-12-00014708

Dear Ms. Derry:

This responds to Licensee's *Request*¹ that we refund all annual regulatory fee payments paid between September 18, 2007, and September 7, 2012, a total of \$8,877.84, and that we change Licensee's filing status to exempt. As we discuss below, because Licensee failed to comply with our procedural rules for filing and to establish grounds for exemption, we dismiss and deny the *Request*.

Background

On September 14, 2012, Licensee submitted an email request to ARINQUIRIES seeking a refund of the annual regulatory fees paid from 2007 through 2012,² and a change in its status from fee payable to exempt from regulatory fees. Licensee asserts it is "a municipal entity created by [an] attached Intergovernmental Agreement between the ... cities of Monmouth and Independence Oregon. Since [Licensee is] a government entity[, it is Licensee's] understanding that [it is] exempt from paying [annual regulatory fees]."³ Licensee provided electronic copies (in pdf-format) of the *MINET IGA* and *Payment Records*.

¹ Email from Molly Derry [mderry@minetfiber.com] to ARINQUIRIES (Sep. 14, 2012) (Request) with 13114699 Payment History.pdf (seven pages including FCC Fee Filer, Regulatory Fee Manager and Electronic Form 159, FCC Online Payment Receipt, 9/7/2012, 9/17/2009, 9/14/2009, 9/25/2008, 8/29/2008, 8/29/2008, and 9/18/2007)(*Payment Records*) and Restatement of MINET Intergovernmental Agreement between the City of Independence and the City of Monmouth (Mar. 14, 2007) (*MINET IGA*).

² Our records indicate that the payment in 2012 included payment of then delinquent 2010 and 2011 regulatory fees and accrued charges.

³ *Id.*

Missing from Licensee's submission is reference to and explanation of related and relevant Oregon statutes pertaining to telecommunications utilities and municipal participation in utilities, e.g., Oregon Revised Statutes, Chapters 225 (Municipal Utilities), 757 (Utilities Regulation), or 759 (Telecommunication Utility Regulation), and other documentation pertaining to the procedures and legal authority establishing Licensee.

Standards

Our rule at 47 C.F.R. §1.1162 provides general exemptions from regulatory fees. Related to Licensee's *Petition*, our rule provides,

[n]o regulatory fee established in §§1.1152 through 1.1156, unless otherwise qualified herein, shall be required for ... (b) Applicants, permittees, or licensees who qualify as government entities. For purposes of this exemption, a government entity is defined as any state, possession, city, county, town, village, municipal corporation, or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs.

As to the process, a licensee seeking an "exemption from a regulatory fee shall [file] with the Secretary, Federal Communications Commission, Attention: Managing Director, Washington, D.C. 20554."⁴ The consequence of filing to follow that rule is that "[a]pplications and other filings not submitted in accordance with the addresses or locations set forth [in our rules] will be returned to the applicant without processing."⁵

Requests for refunds are governed by our rule at 47 C.F.R. § 1.1160.

Moreover, the Commission's rule at 47 C.F.R. § 1.49 establishes standards to which applicants must adhere in submitting pleadings. Improperly submitted information that results in a defective application may lead to dismissal.⁶

Discussion

We look first to whether the matter is properly before us, and find that it is not. Licensee submitted its *Request* to ARINQUIRIES with two *pdf-format* attachments, which failed to comply with our rule at 47 C.F.R. § 1.1159(c) requiring Licensee to file with the Secretary, FCC its request for exemption under 47 C.F.R. § 1.1162, with printed materials. Licensee's submission to ARINQUIRIES failed to comply with § 1.1159(c), thus it was not filed,⁷ and under

⁴ 47 C.F.R. § 1.1159(c).

⁵ 47 C.F.R. § 0.401 ("The Commission maintains several offices and receipt locations. Applications and other filings not submitted in accordance with the addresses or locations set forth [in the Commission's rules] will be returned to the applicant without processing.").

⁶ See Winnebago Cooperative Telephone Association, *Memorandum Opinion and Order*, 5 FCC Rcd 1247, 1248 (1990); Queen City Cellular Communications, *Order on Review*, 5 FCC Rcd 509, 510 (1990).

⁷ 47 C.F.R. § 1.7 ("pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission.").

47 C.F.R. § 0.401, we dismiss and return the submission without processing. That disposition ends the matter; however, as a matter of administrative economy, we look to the merits of the *Request*, and for the reasons discussed next, we deny.

Licensee points only to the *MINET IGA* as the ground for the exemption. That document does not establish that Licensee is a "state, possession, city, county, town, village, municipal corporation, or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs."⁸

Our determination whether Licensee or any applicant for an exemption is within the meaning of 47 C.F.R. § 1.1162(b) includes analysis of the nature and status of the entity, *i.e.*, is it a governmental entity and of the function the entity provides, *i.e.*, whether the function is an exercise of sovereign direction and control. If the entity is not a government entity and it is not engaged in a government function, it does not qualify for an exemption.

Licensee describes itself as having been created from an agreement between two cities. That agreement, however, fails to establish each of the necessary three prongs of our rule: that Licensee is a governmental entity, controlled by publicly elected or duly appointed public officials who exercise sovereign direction and control over the program.

First, Licensee failed to establish that it is a city, town or municipal corporation, or similar political organization or subpart thereof. Specifically, the *MINET IGA* does not establish Licensee is a governmental activity conducting governmental functions. Rather, it evidences Licensee is an entity that two cities created to cooperate "in the expansion of the fiber optic loop constructed by the [cities] for the delivery of services to individual users within each City."⁹ Indeed, the terms of *MINET IGA*, define the government authority with the terms "franchise authority" or "franchisor" that may desire services from Licensee under the terms of service agreement executed with Licensee.¹⁰ Moreover, Licensee pays each city a franchise fee based on the customer base residences.¹¹ Thus, the *IGA* represents Licensee to be a non-governmental entity providing services in a proprietary manner, rather than the city or subpart thereof providing a governmental function.

Next, the Licensee's leadership is not, as required by our rule, "publicly elected or duly appointed public officials." Rather, a board of directors of whom two are elected, two selected from the public, and two are the respective City Managers controls Licensee.¹² Moreover, Licensee's employees are "not deemed to be employed by [either city]," and they are "not covered by the collective bargaining agreement between [the two cities] and the collective bargaining agreement of [the Licensee] Member."¹³ Further, in that regard, Licensee "accept[s] liability for personnel benefits" and personnel and labor related legal fees and costs.¹⁴

⁸ 47 C.F.R. § 1.1162.

⁹ *MINET IGA* at 1.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 6.

¹² *Id.* at 2.

¹³ *Id.* at 7.

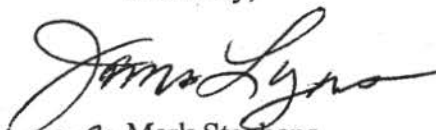
¹⁴ *Id.* at 8.

Finally, even on a yet unproved alternative theory that Licensee is a subpart of the two cities, Licensee failed to establish it is a municipal corporation instituted for public purposes,¹⁵ and exercising governmental functions under proper authority, rather than proprietary functions.¹⁶ For example, a governmental function (in relation to our rule mandating the exercise of sovereign direction and control) is the performance of a public service for the general welfare of the inhabitants or the community, in which the municipal corporation has no private interest and for which it derives no special benefit or advantage. Conversely, a municipality (or its subpart) acting beyond the scope of ordinary governmental functions, such that it is engaging in ministerial or private activities, or services for a profit, is treated as a private corporation.¹⁷ Here, Licensee has not established itself to be a municipality or subpart thereof, but even so, it has a private interest and it derives benefits and advantages related to its business activity.¹⁸

Overall, Licensee provides proprietary services outside the governmental function. When an entity, including a municipality, engages in such proprietary functions, then as an individual or privately owned corporation engaged in the same activity, the municipality is liable for its acts and the payment of regulatory fees.¹⁹ Here, Licensee is not a municipality performing governmental functions, thus no exemption is appropriate. We deny the *Request*.

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,


FOR: Mark Stephens
Chief Financial Officer

¹⁵ See *Mayor and Recorder of City of Nashville v. Ray*, 86 U.S. 468, 475 (1873).

¹⁶ *Owen v. City of Independence*, 445 U.S. 622, 645 (1980); see *GTE Northwest Inc. v. Oregon PUC*, 39 P.3d 201, 208 (Ct. App. Or. 2002) (A city generally may exercise authority only within its corporate limits. A municipality acting in its governmental or proprietary capacity can do so only by virtue of express or implied authority conferred upon it.), see also *Miller Grocery Co. v. City of Des Moines*, 192 N.W. 302 (S.C. Iowa 1923).

¹⁷ *AGI Associates, LLC v. City of Hickory*, 773 F.3d 576, 579 (4th Cir. 2014). See e.g., *Springfield Utility Bd. v. Emerald People's Utility Dist.*, 84 P.3d 167, 174 (Ct. App. Or. 2004) (Discussion of people's utility district being a municipal corporation and the resulting design to carry out governmental functions.).

¹⁸ See e.g., *MINET IAG*, Powers and Duties of the Board, pp. 3-5.

¹⁹ *Owen v. City of Independence*, *supra*, 445 U.S. at 644.

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 25 2015

OFFICE OF
MANAGING DIRECTOR

Matthew H. McCormick, Esq.
Davina S. Sashkin, Esq.
Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209

**Licensee/Applicant: Reier Broadcasting
Company, Inc.**

Petition For Reconsideration, Clarification of
Petition for Reconsideration:

Stations: KBOZ, KOBZ-FM, KOBB, KOBB-FM,
KOZB, K240CO, K265AS, K288ES, and
Auxiliaries: KB97406, KQB693, WGZ540,
WHN278, and WMG482.

Disposition: Dismissed (47 U.S.C. § 159(c); 47
C.F.R. §§ 1.106(n); 1.1164 (e), 1.1167(b)(2)).

Fees: Fiscal Year (FY) 2013 Regulatory Fees

Filed: Mar. 12 and 13, 2014

Fee Control No.: RROG-14-00015567

Payment Amounts: See Treasury

Dear Counsel:

This responds to Licensee's *Petition*¹ to reconsider our dismissal of Licensee's *FY 2013 Request*² for waiver and deferment of the required Fiscal Year (FY) 2013 regulatory fees due for Stations KBOZ, KOBZ-FM, KOBB, KOBB-FM, KOZB, K240CO, K265AS, K288ES, and Auxiliaries KB97406, KQB693, WGZ540, WHN278, and WMG482. In addition, we respond to Licensee's March 13, 2014, *Clarification of Petition for Reconsideration (Clarification)*.³ As we

¹ Request: Financial Hardship (47 C.F.R. §§ 1.164(c) & (e) [sic], 1.1166(c)) of Reier Broadcasting Licensee, Inc, Stations KBOZ, KBOZ-FM, KOBB, KOBB-FM, KOZB, K240CO, K265AS, K288ES, and auxiliaries KB97406, KQB693, WGZ540, WHN278, WMG482, Fiscal Year 2013 Regulatory Fees, *Petition for Reconsideration* (Mar. 10, 2014)(filed Mar. 12, 2014) (*Petition*) with Form 1120S, U.S. Income Tax Return for an S Corporation, Tax Year 2010, Form 1120S, U.S. Income Tax Return for an S Corporation, Tax Year 2010 (without Statement), 2011 Montana S Corporation Information and Composite Tax Return, and Form 1120S, U.S. Income Tax Return for an S Corporation, Tax Year 2010.

² Letter from Mathew M. McCormick, Esq., and Davina S. Sashkin, Esq., Fletcher, Heald & Hildreth, P.L.C., 1300 North 17th Street, Arlington, VA 22209 to FCC, Office of the Managing Director, 445 12th St., S.W., Washington, DC 20554 (Sep. 19, 2013) (rec'd Sep. 20, 2013) (*FY 2013 Request*).

³ Requests: Financial Hardship (47 C.F.R. §§ 1.164(c) & (e) [sic], 1.1166(c)) of Reier Broadcasting Licensee, Inc, Stations KBOZ, KBOZ-FM, KOBB, KOBB-FM, KOZB, K240CO, K265AS, K288ES, and auxiliaries KB97406,

discuss below, because Licensee is a delinquent debtor, we dismiss the *Petition* and *Clarification*, and we renew our demand for immediate payment of the delinquent amounts⁴ plus accrued but unpaid statutory charges of collection.⁵

Background

Our records show that Licensee is delinquent in paying its regulatory fees for FY 2010, FY 2011, FY 2012, FY 2013, and FY 2014.

Licensee failed to pay its FY 2010 regulatory fees,⁶ even so Licensee submitted the *FY 2011 Request*⁷ for waiver and deferment of its required FY 2011 regulatory fees. On May 4, 2012, we denied Licensee's *FY 2011 Request* and demanded payment of the fees within 30 days.⁸ When Licensee failed to make payment, the amount of the FY 2011 regulatory fees and charges was added to the prior delinquent amounts. Despite the increasing debt and the consequences of being a delinquent debtor, Licensee submitted another request to waive fees, this time the *FY 2012 Request*.⁹ On February 6, 2014, we responded by dismissing¹⁰ that request on two grounds. We explained that Licensee was delinquent in paying the FY 2010 and FY 2011 regulatory fees and that Licensee failed to provide supporting documentation of financial hardship.¹¹ That dismissal notified Licensee of several important matters. First, under 47 C.F.R. § 1.1910, we withhold action on and dismiss any other pending or filed application by a delinquent debtor, including a petition for reconsideration or any application for review.¹² Additionally, we continue to assess charges, we transfer delinquent debt to Treasury, and we apply administrative offset.¹³

KQB693, WGZ540, WHN278, WMG482, Fiscal Year 2012 Regulatory Fees and Fiscal Year 2013 Regulatory Fees, *Clarification of Petition for Reconsideration* (Mar. 13, 2014)(filed Mar. 13, 2014) (*Clarification*).

⁴ Under 31 U.S.C. § 3711(g)(1) and 31 C.F.R. § 285.12, we transferred licensee's delinquent debts to Treasury for further collection action. Additional charges of collection as well as interest and penalties continue to accrue until the full amount is paid. To determine the balance and payoff, Licensee should contact the Department of Treasury.

⁵ See 31 U.S.C. § 3717, 47 C.F.R. § 1.1940.

⁶ See FY 2010 Regulatory Fees Due No Later Than August 31, 2010, Eastern Time, *Public Notice*, DA 10-1451 (Aug. 9, 2010).

⁷ Letter from Mathew M. McCormick, Esq., and Davina S. Sashkin, Esq., Fletcher, Heald & Hildreth, P.L.C., 1300 North 17th Street, Arlington, VA 22209 to FCC, Office of the Managing Director, 445 12th St., S.W., Washington, DC 20554 (Sep. 14, 2011) (*FY 2011 Request*).

⁸ See Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for Fiscal Year 1994, *Report and Order*, 9 FCC Rcd 5333, 5346, ¶ 35 (1994), *recon. denied*, 10 FCC Rcd 12759 (1995) ("the petitioner will have 30 days to [pay the fee] in order to avoid the assessment of penalty charges and the invocation of any other available remedy. The filing of a petition for reconsideration will not toll this 30-day period.").

⁹ Letter from Mathew M. McCormick, Esq., and Davina S. Sashkin, Esq., Fletcher, Heald & Hildreth, P.L.C., 1300 North 17th Street, Arlington, VA 22209 to FCC, Office of the Managing Director, 445 12th St., S.W., Washington, DC 20554 (Sep. 13, 2012) (*FY 2012 Request*).

¹⁰ Letter from Mark Stephens, Chief Financial Officer, FCC to Matthew M. McCormick, Esq., Davina S. Sashkin, Fletcher, Heald & Hildreth, 1300 North 17th St., 11th Fl., Arlington, VA 22209 (Feb. 6, 2014) (*FY 2012 Dismissal*).

¹¹ 47 C.F.R. § 1.1166(c).

¹² *FY 2012 Dismissal* at 2.

¹³ *Id.*

Also on February 6, 2014, we dismissed¹⁴ Licensee's *FY 2013 Request* to waive the FY 2013 regulatory fees, which is the underlying decision for the *Petition*. We dismissed that request because Licensee was delinquent in paying fees for FY 2010 and FY 2011, and, in the alternative, because Licensee failed to provide any supporting documentation of financial hardship. That dismissal also notified Licensee that under 47 C.F.R. § 1.1910, we withhold action on and dismiss any other pending or filed application by a delinquent debtor, including a petition for reconsideration or any application for review,¹⁵ and that charges accrue, delinquent debts are transferred to Treasury, and administrative offset may be applied.¹⁶

Now, Licensee petitions for reconsideration on the ground it is "experiencing financial hardship that presents compelling and extraordinary circumstances weighing in favor of a fee waiver, [thus] the Dismissal must be reversed."¹⁷ Licensee attaches "the three most recently available tax returns" to support its assertion that it experienced a "decreasing income stream [and] a staggering increase in debts."¹⁸ Furthermore, Licensee asserts it reduced spending, faced a bank overdraft, and saw increases in debt.

After filing its *Petition*, on March 13, 2014, Licensee filed a *Clarification* "mov[ing] for leave to clarify the petition" explaining it "inadvertently captioned and addressed only the [FY 2013 Dismissal]. Licensee intended to petition for ... reconsideration of the 2013 Fee Dismissal as well as the dismissal ... for FY 2012 regulatory fees ... the arguments and factual evidence ... are applicable to the establishment of financial hardship [of] the 2012 Fee Dismissal as well as the 2013 Fee Dismissal."¹⁹ In a footnote, Licensee asserts the *Petition* and *Clarification* are timely because "no public notice has issued regarding either of the dismissals ... thus petitions for reconsideration and modifications thereto remain timely. See [47 C.F.R. §] 1.106(f)."²⁰

Standards

Fee Waiver

In establishing a regulatory fee program, the Commission recognized that in certain instances, payment of a regulatory fee may impose an undue financial hardship upon a licensee, and it may be waived, reduced or deferred, but only upon a showing of good cause and a finding that the public interest will be served thereby.²¹ The Commission has narrowly interpreted its waiver authority to require a showing of compelling and extraordinary circumstances that

¹⁴ Letter from Mark Stephens, Chief Financial Officer, FCC to Matthew M. McCormick, Esq., Davina S. Sashkin, Fletcher, Heald & Hildreth, 1300 North 17th St., 11th Fl., Arlington, VA 22209 (Feb. 6, 2014) (*FY 2013 Dismissal*).

¹⁵ *FY 2013 Dismissal* at 2.

¹⁶ *Id.*

¹⁷ *Petition* at 1.

¹⁸ *Petition* at 2. As is explained in our standards, below, tax returns alone do not provide sufficient documentation of financial hardship.

¹⁹ *Clarification* at 1.

²⁰ *Clarification* at 2, n. 1.

²¹ 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). See also Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for Fiscal Year 1994, *Report and Order*, 9 FCC Rcd 5333, 5344, ¶ 29 (1994), *recon. granted in part*, 10 FCC Rcd 12759 (1995).

outweigh the public interest in recouping the Commission's regulatory costs.²² In an appropriate situation, we may grant fee relief based on a "sufficient showing of financial hardship."²³ In such matters, "[m]ere allegations or documentation of financial loss, standing alone," do not suffice and "it [is] incumbent upon each regulatee to fully document its financial position and show that it lacks sufficient funds to pay the regulatory fee and to maintain its service to the public."²⁴ Thus, in order to establish a basis for waiver predicated on financial need, the regulatee must provide financial documents including, *e.g.*, a licensee's balance sheet and profit and loss statement (audited, if available), a cash flow projection for the next twelve months (with an explanation of how calculated), a list of their officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information. On this information, the Commission considers on a case-by-case basis whether the licensee met the standard to show the station lacks sufficient funds to pay the regulatory fee and maintain service to the public.²⁵

In such matters, when an applicant for relief is delinquent in paying the regulatory fee, under 47 U.S.C. § 159(c)(2) and 47 C.F.R. §§ 1.1164, 1.1166, and 1.1910(a)(2) & (3), we will dismiss²⁶ a request for relief and impose the statutory penalty.²⁷

Petition for Reconsideration

Under 47 C.F.R. § 1.106(i), "Petitions for reconsideration ... shall be submitted to the Secretary, Federal Communications Commission, Washington, DC 20554, by mail, by commercial courier, by hand, or by electronic submission through the Commission's Electronic Comment Filing System or other electronic filing system (such as ULS). Petitions submitted only by electronic mail and petitions submitted directly to staff without submission to the Secretary shall not be considered to have been properly filed."²⁸ A document is *filed* with the Commission upon its receipt at the location designated by the Commission,²⁹ and applications and other

²² *Id.*

²³ 10 FCC Rcd at 12761-62, ¶ 13.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 47 U.S.C. § 159(c)(2) ("The Commission may dismiss any application or other filing for failure to pay in a timely manner any fee or penalty under this section."); 47 C.F.R. §§ 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment."); 1.1166(c) ("Waiver requests that do not include the required fees or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship.").

²⁷ 47 U.S.C. § 159; 47 C.F.R. § 1.1166; Waivers, Reductions and Deferments of Regulatory Fees, *Regulatory Fees Fact Sheet* (Sep. 5, 2013) 2013 WL 4773993 (F.C.C.) ("The Commission will dismiss any petition for waiver of a regulatory fee that does not include a payment or the required petition for deferral and supporting documentation, and under 47 U.S.C. § 159(c) and 31 U.S.C. § 3717, the Commission is required to impose the 25% penalty and other relevant charges. A request for waiver, reduction or deferral must be received before the fee due date. * * * The Commission will dismiss a waiver request filed by a delinquent debtor or a petition that does not have the required financial documentation.").

²⁸ 47 C.F.R. § 1.106(i). *See also* 47 C.F.R. § 1.1159(b) ("Petitions for reconsideration ... submitted with no accompanying payment should be filed with the Secretary").

²⁹ 47 C.F.R. § 1.7.

filings not submitted in accordance with the correct addresses or locations will be returned to the filer without processing.³⁰

Furthermore, a petition for reconsideration must "state with particularity the respects in which petitioner believes the action taken by ... the designated authority should be changed,"³¹ and the petition must identify a material error, omission or reason warranting reconsideration.³²

The filing of a petition for reconsideration "will not relieve licensees from the requirement that full and proper payment of the underlying fee payment be submitted, as required by the Commission's action, or delegated action, on a request for waiver, reduction or deferment."³³

Under 47 C.F.R. § 0.445(a) & (e), adjudicatory opinions and orders of the Commission, or its staff acting on delegated authority are mailed or delivered by electronic means, and because they are not published in the Federal Register, the FCC Record, FCC Reports, or Pike and Fischer Communications Regulation, they may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission. Furthermore, as set forth in 47 C.F.R. § 1.4(b), for purposes of computing time within which to file a timely petition for reconsideration or an application for review,³⁴ a decision under delegated authority is effective upon release, which date commences the period.³⁵ Accordingly, any person desiring Commission consideration of a final action taken pursuant to delegated authority shall file either a petition for reconsideration or an application for review (but not both) within 30 days from the date of the action as defined in § 1.4(b) of our rules.³⁶ If the petition is not filed in a timely manner, it may be dismissed or denied.³⁷ The

³⁰ *Id.*

³¹ 47 C.F.R. § 1.106(d)(1).

³² 47 C.F.R. § 1.106(d)(2).

³³ 47 C.F.R. § 1.1167(b)(2) ("The filing of a petition for reconsideration or an application for review of a fee determination will not relieve licensees from the requirement that full and proper payment of the underlying fee payment be submitted, as required by the Commission's action, or delegated action, on a request for waiver, reduction or deferment. ... If the fee payment should fail while the Commission is considering the matter, the petition for reconsideration or application for review will be dismissed."); see 9 FCC Rcd at 5346, ¶ 35, *supra* ("The filing of a petition for reconsideration will not toll this 30-day period."). See 47 C.F.R. § 1.1164 (e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment. The application may be resubmitted only if accompanied by the required regulatory fee and by any assessed penalty payment."); § 1.1164 (f)(5) ("An application or filing by a regulatee that is delinquent in its debt to the Commission is also subject to dismissal under 47 CFR 1.1910.").

³⁴ See 47 C.F.R. § 1.104.

³⁵ 47 C.F.R. § 1.4(b)(5) ("Unless otherwise provided, the first day begins with an action taken by ... staff pursuant to delegated authority is the *day after the day* on which public notice of that action is given. See § 1.4(b) (1)-(5) of this section. ... For purposes of this section, the term *public notice* means the date of any of the following events. ... (5) If a document is neither published in the FEDERAL REGISTER nor released, and if a descriptive document entitled 'Public Notice' is not released, the date appearing on the document sent (e.g., mailed, telegraphed, etc.) to persons affected by the action."). See 47 C.F.R. § 1.102(b) (1) ("Non-hearing or interlocutory actions taken pursuant to delegated authority shall, unless otherwise ordered by the designated authority, be effective upon release of the document containing the full text of such action, or in the event such a document is not released, upon release of a public notice announcing the action in question.").

³⁶ 47 C.F.R. § 1.104(b).

³⁷ 47 C.F.R. §§ 1.106 (f) & (p)(7) & (9).

petition for reconsideration is not filed until its receipt at the location designated by the Commission.³⁸

Discussion

Both the *FY 2012 Dismissal* and the *FY 2013 Dismissal* (collectively, *Dismissals*) notified Licensee it remained delinquent in paying the FY 2010 and FY 2011 regulatory fees. Both *Dismissals* demanded that Licensee pay delinquent regulatory fees, and they notified Licensee that if payment was not received within the allowed period, the amount owed then would be delinquent.³⁹ Both *Dismissals* admonished Licensee that a petition for reconsideration does not toll the 30-day period.⁴⁰ Both *Dismissals* notified Licensee of the sanctions imposed on delinquent debtors, including withholding of action on applications, including a petition for reconsideration, and continued accrual of charges. As set forth in our rule, the filing of a petition for reconsideration "will not relieve licensees from the requirement that full and proper payment of the underlying fee payment be submitted, as required by the Commission's action, or delegated action, on a request for waiver, reduction or deferment."⁴¹

Licensee elects to disregard our rules; we will not. Our records show Licensee remains a delinquent debtor, thus we dismiss the *Petition* and *Clarification*.⁴² That resolves the matter; however, as a matter of administrative economy we add in our discussion three alternative grounds for dismissal provided for at 47 C.F.R. § 1.106(p)(1), (4), & (9).

First, Licensee's *Clarification*, which was filed March 13, 2014, is untimely, having been more than 30 days after *FY 2012* and *FY 2013 Dismissals*.⁴³ Licensee's footnote comment that because no public notice had issued, the submission is timely, fails to address the application of the Commission's rules at 47 C.F.R. §§ 1.4, 1.102, and 1.104 that establish both *Dismissals* were effective on the date of the letters, February 6, 2014, which date commenced the 30-day period that expired March 10, 2014, three days before Licensee filed its *Clarification*.

Next, Licensee failed to "state with particularity the respects in which petitioner believes the action taken by ... the designated authority should be changed."⁴⁴ As noted above, we dismissed the *FY 2012 Request* and the *FY 2013 Request* because Licensee was a delinquent debtor and on the alternative grounds that Licensee failed to provide any supporting documentation. Licensee fails to discuss to what extent that action should be altered.

³⁸ 47 C.F.R. § 1.7.

³⁹ 31 U.S.C. § 3701(b); 31 C.F.R. § 900.2; 47 C.F.R. § 1.1901.

⁴⁰ *FY 2012 Dismissal* at 2; *FY 2013 Dismissal* at 2.

⁴¹ 47 C.F.R. § 1.1167(b)(2) ("The filing of a petition for reconsideration or an application for review of a fee determination will not relieve licensees from the requirement that full and proper payment of the underlying fee payment be submitted, as required by the Commission's action, or delegated action, on a request for waiver, reduction or deferment. ... If the fee payment should fail while the Commission is considering the matter, the petition for reconsideration or application for review will be dismissed.").

⁴² 47 C.F.R. §§ 1.1164 (e), 1.1164 (f)(5), 1.1167(b)(2), 1.1910.

⁴³ 47 C.F.R. §§ 1.4(b)(5).

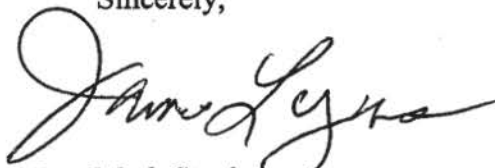
⁴⁴ 47 C.F.R. § 1.106(d)(1).

Finally, the petition must identify a material error, omission or reason warranting reconsideration.⁴⁵ Licensee does not point out a material error, rather we are asked to consider information that Licensee should have, but failed to include with its initial submission. Licensee fails to challenge either ground for dismissal, *i.e.*, delinquency and the failure to include supporting documentation.

This letter provides notice that 31 U.S.C. § 3717(e) and 47 C.F.R. § 1.1940 require us to assess (a) collection charges, (b) interest at the Treasury rate when the debt is more than 30 days delinquent, and (c) a penalty of 6% after 90 days. These charges will continue until Licensee pays the debt in full or executes an approved written installment payment plan. Furthermore, under 31 U.S.C. § 3711(g), without further notice, and usually within 180 days or less of delinquency, we transfer delinquent debt to Treasury, which will initiate collection action through private collection activities and assess additional charges. In addition, we may refer the debt to the Department of Justice, which may result in litigation and additional costs. Finally, under 31 U.S.C. § 3716, 31 C.F.R. § 285.5 and 47 C.F.R. § 1.1912, some or all of the debt may be collected by non-centralized or centralized administrative offset. Also, under 31 U.S.C. § 3711(e), this debt and Licensee's payment history will be reported to credit reporting information bureaus. Because we have furnished notice here, Licensee may not receive another notification of this process.

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995

Sincerely,

A handwritten signature in dark ink, appearing to read "Mark Stephens", written in a cursive style.

FM Mark Stephens
Chief Financial Officer

⁴⁵ 47 C.F.R. § 1.106(d)(2).